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# AVAILABILITY, AFFORDABILITY, AND ACCOUNTABILITY: REGULATORY REFORM OF INSURANCE

LEONARD SCHULTE\*

*The Florida Legislature tackled the widely publicized liability insurance crisis during the 1986 Regular Session by enacting the Tort Reform and Insurance Act of 1986. Legislators responded to insurance industry concerns, regarding the doctrine of joint and several liability and spiraling litigation costs and awards, as well as commercial industry concerns, regarding availability and affordability of liability insurance. The author examines the legislature's attempt to resolve the insurance crisis partly through a comprehensive insurance regulatory plan, and he considers the constitutional implications of this scheme.*

**I**NSURANCE crises have become a regular feature of the Florida legislative landscape, flowering almost as dependably as Tallahassee's dogwoods. During the last decade, Florida legislators have addressed the medical malpractice crises of 1976 and 1985,<sup>1</sup> the automobile insurance crises of 1976 and 1977,<sup>2</sup> the workers' compensation crisis of 1979,<sup>3</sup> and the self-imposed crisis of 1982 occasioned by the Sunset Act review of the Florida Insurance Code.<sup>4</sup> None of these crises dominated a legislative session as completely, or created as much controversy, as the recent liability insurance crisis of 1986.

The Florida Legislature responded to the liability insurance crisis by enacting chapter 86-160, the Tort Reform and Insurance Act of 1986.<sup>5</sup> In this Article the author describes the crisis, summarizes and analyzes the insurance provisions of the Act, and analyzes potential constitutional challenges to the validity of the Act.

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The views expressed in this Article are those of the author and do not necessarily reflect those of the Florida Senate.

1. See ch. 76-260, 1976 Fla. Laws 660; ch. 85-175, 1985 Fla. Laws 1180.

2. See ch. 76-266, 1976 Fla. Laws 716; ch. 77-468, 1977 Fla. Laws 2057.

3. See ch. 79-40, 1979 Fla. Laws 215; ch. 79-312, 1979 Fla. Laws 1645.

4. See ch. 82-243, 1982 Fla. Laws 1289.

5. Tort Reform and Insurance Act of 1986, ch. 86-160, 1986 Fla. Laws 695.

## I. THE INSURANCE CRISIS: PERCEPTIONS AND REALITIES

Inevitably, major reform of insurance regulation occurs only in the aftermath of a crisis. The stakes are too high for it to be otherwise. In late 1985 and early 1986, only the most casual follower of local and national media could have been unaware that, all over the United States, obstetricians were refusing to deliver babies, day care centers were closing, and whole communities stopped offering youth sports programs—all ostensibly because liability insurance was prohibitively expensive or entirely unavailable. The situation in Florida was not much better. From Miami to Pensacola, insurance problems were reported in the direst of terms. The stories were anecdotal, but they were the kind of stories to which legislators and their constituents respond.

For example, within one year the Leonard Brothers Trucking Company faced fivefold increases in its cargo and real estate premiums and a fivefold increase in the premium on its \$1 million liability policy.<sup>6</sup> The price of its insurance went from \$37,500 to \$189,000. The company also was unable to purchase—at any price—a \$20 million umbrella policy. The family that owned the company decided to liquidate the sixty-six-year-old firm.<sup>7</sup>

Piper Aircraft, which manufactures small airplanes in Vero Beach, decided to lay off from one-third to one-half of its workforce because of increasing insurance premiums.<sup>8</sup> A stock analyst was quoted as saying that Piper spent about one-fourth of its sales revenues on product liability.<sup>9</sup>

Governmental agencies were also affected. The Southwest Florida Water Management District's liability coverage was reduced from \$10 million to \$1 million with almost no reduction in premium.<sup>10</sup> The Tampa Housing Authority faced a premium increase of \$569,000—more than 490%—on its general liability policy.<sup>11</sup> The City of Daytona Beach faced a 1,700% increase in its insurance premium.<sup>12</sup>

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6. *Insurance Crisis?*, Miami Herald, Sept. 23, 1985 (Business Monday), at 1, col. 2.

7. *Id.*

8. *Liability costs ground ailing general aviation*, Miami Herald, Feb. 10, 1986 (Business Monday), at 19, col. 1.

9. *Id.*

10. *Water district's insurance rates are skyrocketing*, Tampa Tribune, Oct. 3, 1985, at B1, col. 4.

11. *Housing Authority slapped with insurance premium hike*, Tampa Tribune, Oct. 5, 1985, at B7, col. 1.

12. *Insurance rates take toll on governments*, Orlando Sentinel, Sept. 9, 1985, at B1, col. 1.

Large companies as well as small ones felt the pinch. McKenzie Tank Lines, the tenth-largest tank truck company in the nation, had paid \$500,000 for a \$40 million liability policy in 1985. In 1986, the best policy it could find was \$10 million in coverage for \$2.4 million. To pay its increased premium, McKenzie raised its rates four percent.<sup>13</sup>

This collection of anecdotes is by no means comprehensive, but it illustrates the insurance crisis as perceived by the purchasers of insurance and as presented to Floridians in the press. However, newspaper articles were not the only way the people were alerted to the existence of the crisis. In early 1986, the Insurance Information Institute, an industry organization, sponsored a six million dollar national television advertising campaign that presented examples of what the advertisements referred to as "the lawsuit crisis" and urged reforms to the tort system.<sup>14</sup> In response, the Academy of Florida Trial Lawyers, through an entity called Floridians Against Constitutional Tampering, spent \$200,000 on advertisements in four major urban areas, contending that the crisis was the result of unnecessarily high premiums and urging that premiums be rolled back.<sup>15</sup>

The insurance crisis of 1986, however, was more than newspaper anecdotes and perceptions shaped by television advertising. During March 1986, Associated Industries of Florida, a business lobbying group, surveyed its membership on the cost and availability of commercial liability insurance.<sup>16</sup> The survey purported to document the existence and extent of the crisis. First, it showed that over the preceding four years, commercial liability premiums had increased by a compounded average of 256% statewide,<sup>17</sup> while the companies responding registered a 129% increase over the prior year alone.<sup>18</sup> During this same four-year period, the only industry

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13. *A liability-insurance crisis*, Tallahassee Democrat, Jan. 22, 1986, at D1, col. 2.

14. *Liability lawsuit war goes public*, Orlando Sentinel, May 14, 1986, at B1, col. 5.

15. *Id.*

16. Associated Indus. of Fla., Actuarial Analysis of Availability and Affordability of Commercial Liability Insurance Coverage in Florida (Apr. 23, 1986) (Legislative Letter). Associated Industries of Florida (AIF) sent questionnaires to its entire membership, which numbers more than 3,800 companies statewide. AIF received 196 responses of which 116 were used to compile the statistics quoted. *Id.*

17. *Id.* (chart 1). Southeast Florida registered the largest increase with a compounded average of 275%. *Id.*

18. *Id.* (chart 3).

with less than a 200% increase was the wholesale and retail trade; those hardest hit were transportation, services, and construction.<sup>19</sup>

Further, the survey reported that twenty-six percent of the respondents statewide had difficulty even obtaining insurance.<sup>20</sup> The industries with the greatest availability problems were services and the wholesale and retail trade. They were not alone. Other industries struck with significant availability problems were construction, manufacturing, agriculture, forestry, and fishing.<sup>21</sup>

In any crisis, one is likely to emphasize the views of the perceived victims over the views of the perceived victimizers; the closing of a day care center is more dramatic than changes on an insurance company's balance sheet. However, it became apparent in 1986 that insurance companies also had been suffering.

The problems of the insurance industry were concisely described by the staff of the Senate Committee on Commerce in an exhaustive report that stated:

According to industry spokesmen and observers, hardening of the commercial liability market is a direct result of dramatic losses reported by property and casualty (PC) insurers during the last 3 years. PC insurers incurred a net underwriting loss of \$21.48 billion in 1984. This "underwriting loss exceeded by more than \$8 billion the previous record loss of \$13.32 billion in 1983. The 1984 underwriting loss represented 18.7 percent of earned premiums of \$114.64 billion. This means that for every \$100 the industry earned in premiums during the year, it incurred \$118 in losses and expenses." Reinsurers, who take the brunt of the unpredictable risks, paid out nearly \$141 for every \$100 in premium income that year. The Insurance Information Institute reports that the 1985 underwriting loss will be about \$25 billion. Additionally, the PC industry incurred a \$3.8 billion pre-tax operating loss in 1984 and the Insurance Information Institute has reported that this figure will reach \$5.5 billion in 1985. Combined with the fact that policyholders surplus fell 2.7 percent to 63.8 billion in

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19. *Id.* (chart 2). Similarly, with one exception, these same industries registered the highest single-year increases: agriculture, forestry and fishing (290%); manufacturing (176%); construction (136%), and services (113%). *Id.* (charts 9-14).

20. *Id.* (chart 4). Southeast Florida registered the lowest percentage with 16%. *Id.* (chart 5).

21. *Id.* (charts 15-20).

1984, these numbers are the worst recorded by the PC industry since the San Francisco earthquake and fire of 1906.<sup>22</sup>

According to the industry, the source of these financial problems lay in the tort system, specifically the doctrine of joint and several liability, high contingency fees and defense costs, the litigious nature of American society, the twelve-year statute of limitations for product liability, and the unavailability of periodic payments of damage awards.<sup>23</sup>

Not surprisingly, critics of the industry had other explanations. The president of the National Insurance Consumers Organization claimed that the crisis was fabricated by the industry in order to intimidate and coerce governments into approving exorbitant premiums and changes in the tort system. To consumer activist Ralph Nader, the industry was engaging in extortion, holding both the consumer and governments hostage. Other critics suggested that the industry had engaged in unwise price-cutting when the market was soft, and that it then sought to make up for five years of discounts with one year of increases.<sup>24</sup> Industry critics also pointed to the financial health of the industry. Among the statistics cited was the increase in the Best's Property/Casualty Stock Index since 1982. The insurance stocks in that index grew by forty-seven percent, as compared to the Standard and Poors 500 stock index, which grew by thirty-three percent in the same period. Critics also suggested that the \$3.8 billion pre-tax operating loss of 1984 was deceptive, since capital gains of \$3 billion and tax credits of about \$2 billion left the industry with a net income of \$1.5 billion for that year.<sup>25</sup>

By the time Florida legislators arrived in Tallahassee for the 1986 Regular Session, they were faced with all of the elements of a major crisis: public perception of a crisis formed by extensive press coverage and television advertising, representations of enormous increases in the cost of doing business from virtually every kind of business in the state, representations by the insurance industry that its costs had spiraled out of control, and demands from consumer activists and the trial bar for increased insurance regulation.

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22. STAFF OF FLA. S. COMM. ON COM., A REVIEW OF HISTORICAL ANALYSIS—CURRENT PERSPECTIVES ON THE DOCTRINE OF JOINT AND SEVERAL LIABILITY AND A REVIEW OF TORT REFORM 37-38 (Mar. 1986) (footnotes omitted) (on file with committee).

23. *Id.* at 40-41.

24. *Id.* at 41-42.

25. *Id.* at 42.

## II. CHAPTER 86-160: SUMMARY AND ANALYSIS

The Senate and House responded in remarkably similar ways to the insurance crisis of 1986. By the time the Senate Committee on Commerce reported its Committee Substitute for Senate Bill 465<sup>26</sup> and the House Committee on Health Care and Insurance introduced House Bill 1344,<sup>27</sup> the legislature's response to the crisis had been given definition. Both bills contained some civil litigation reforms,<sup>28</sup> a version of the rate regulation proposals of Insurance Commissioner Bill Gunter,<sup>29</sup> the commercial self-insurance fund proposals supported by Associated Industries,<sup>30</sup> and the creation of an academic task force to study the tort and insurance systems.<sup>31</sup> The Senate version also contained a rate rollback provision.<sup>32</sup> The House did not add rollback provisions until May 22, when the Committee on Appropriations reported out its Committee Substitute for House Bill 1344.<sup>33</sup>

A. *Findings and Purpose*

The preamble of the Tort Reform and Insurance Act of 1986 sets forth the basic groundwork of the Act. It begins by stating that "a financial crisis exists in the liability insurance industry, thereby causing a serious lack of availability of commercial liability insurance."<sup>34</sup> Due to this lack of available coverage, professionals, businesses, and governmental entities face dramatic premium increases, constituting a serious threat to the economy of the state. The preamble further expresses the legislature's concern that unless the crisis is abated, many potential defendants in civil actions will be unable to purchase insurance, and many injured persons

26. FLA. LEGIS., HISTORY OF LEGISLATION, 1986 REGULAR SESSION, HISTORY OF SENATE BILLS at 93, SB 465. The bill also incorporated portions of Fla. SB 349, 592, 698, 699, 700, 701, 702, 956, 977, and 1120 (1986). *Id.*

27. FLA. LEGIS., HISTORY OF LEGISLATION, 1986 REGULAR SESSION, HISTORY OF HOUSE BILLS at 380, HB 1344.

28. See generally Fort, Granger, Polston & Wilkes, *Florida's Tort Reform: Response to a Persistent Problem*, 14 FLA. ST. U.L. REV. 505 (1986).

29. See *Gunter lobbies hard for liability-insurance reform*, Gainesville Sun, Feb. 27, 1986, at A1, col. 1.

30. See Associated Indus. of Fla., *Recommended Solutions Proposed by Associated Industries of Florida to the Commercial Liability Insurance Crisis* (Apr. 16, 1986) (Legislative Letter).

31. See *infra* text accompanying notes 117-19.

32. See Fla. CS for CS for SB 465 (1986).

33. Fla. CS for HB 1344 (1986).

34. Ch. 86-160, 1986 Fla. Laws 695, 698.

will therefore be unable to recover either economic or noneconomic damages. Similarly, the legislature noted the public's concern regarding the cost of litigation and a need for review of the tort and insurance laws.

The concern of the legislature with the performance of the insurance industry is the subject of the Act's next clause, which contains a finding that certain insurers are threatening to make coverage less available and less affordable, actions which would adversely affect the state's economy.<sup>35</sup> The legislature follows this finding with a statement that the Act's insurance provisions must operate even before civil litigation reforms have their full effect: "The Legislature believes it is necessary to avoid an insurance availability crisis, to maintain economic stability, and to protect the people's rights to affordable insurance coverage in the interim before comprehensive reform measures are fully effective."<sup>36</sup>

The legislature then establishes the necessity for regulatory reform, regardless of whether the civil litigation system is reformed, finding that, "in general, the cost of liability insurance is excessive and injurious to the people of Florida and must be reduced."<sup>37</sup>

The next three clauses of the preamble deal exclusively with civil litigation,<sup>38</sup> and are followed by findings that the tort system has significantly contributed to the insurance crisis, that tort law and liability insurance are interdependent and interrelated, and that comprehensive regulatory reform and tort reform are necessary to solve the availability and affordability problem. Finally, the preamble makes it clear that the legislature knew it was enacting a package of major reforms: "the magnitude of this compelling social problem demands immediate and dramatic legislative action."<sup>39</sup>

Section two sets out the Act's purpose.<sup>40</sup> It begins with a declaration that the insurance crisis has "created an overpowering public necessity for a comprehensive combination of reforms to both the tort system and the insurance regulatory system."<sup>41</sup> It then describes the Act as a remedial measure, intended to cure the current crisis and prevent such crises in the future. The purposes of the Act are described as ensuring availability of liability insurance, en-

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35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*, 1986 Fla. Laws at 698-99.

39. *Id.*, 1986 Fla. Laws at 699.

40. *Id.* § 2, 1986 Fla. Laws at 699.

41. *Id.*



suring that injured persons recover reasonable damages, and encouraging early settlement of civil actions.<sup>42</sup> Thus, this section informs agencies and courts of the general purposes of the Act. It is available to clarify ambiguities in the Act; however, it may not be used to create ambiguity or to override operative provisions of the Act.<sup>43</sup>

### *B. Rating, Regulation, and Excess Profits*

Section nine lies at the heart of the 1986 insurance legislation; it provides for extensive regulation of rates charged for property and casualty insurance.<sup>44</sup> While workers' compensation, employers' liability, and private passenger automobile insurance have been extensively regulated for many years, other kinds of property and casualty insurance have been subject to less restrictive standards.<sup>45</sup> For example, under prior law, a rate could be found excessive only if it was "unreasonably high for the insurance provided" and a reasonable degree of competition did not exist in the area with respect to the classification to which the rate applied.<sup>46</sup> Thus, if the regulating authority found a particular market to be competitive, no rate would be found to be excessive. Section nine rectifies this situation by imposing rating standards similar to those used for determining rates for private passenger automobile insurance.<sup>47</sup>

Insurers are guaranteed rates that provide a reasonable rate of return, and are given the option of employing "file and use" rates, which take effect after actual or constructive approval by the Department of Insurance, or "file and use" rates which take effect on a date selected by the insurer, but which are subject to refund orders.<sup>48</sup> The factors to be considered by the Department are: (1) past and prospective loss experience within and outside Florida; (2) past and prospective expenses; (3) the degree of competition for the risk insured; (4) certain investment income; (5) the reasonableness of the judgment reflected in the filing; (6) dividends, savings, or unabsorbed premium deposits allowed or returned to Florida policyholders, members, or subscribers; (7) adequacy of loss

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42. *Id.*

43. See 1A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 20.12 (4th ed. 1985).

44. Ch. 86-160, § 9, 1986 Fla. Laws 695, 704 (amending FLA. STAT. § 627.062 (1985)).

45. Staff of Fla. S. Comm. on Com., CS for CS for SB 465 (1986) Staff Analysis 6 (final July 23, 1986) (on file with committee) [hereinafter cited as Final Staff Analysis].

46. FLA. STAT. § 627.062(2)(a) (1985).

47. Final Staff Analysis, *supra* note 45, at 6.

48. Ch. 86-160, § 9, 1986 Fla. Laws 695, 704 (amending FLA. STAT. § 627.062 (1985)).

reserves; (8) cost of reinsurance; (9) trend factors; (10) applicable conflagration and catastrophic hazards; (11) a reasonable margin for underwriting profit and contingencies; (12) the cost of medical services, if applicable; and (13) other relevant factors that affect claims or expenses.<sup>49</sup>

Further, section nine lists six situations in which a rate may be disapproved. A rate is excessive if it is likely to produce from Florida businesses a profit that is unreasonably high in relation to the risk involved, or if expenses are unreasonably high in relation to services rendered, or if, with respect to a stock insurance company, the rate structure provides for replenishment attributable to investment losses. A rate is inadequate if it is insufficient, together with attributable investment income, to sustain projected losses and expenses. A rate is unfairly discriminatory if it fails to reflect the policyholder's participation in a risk management program under section ten. A rate is inadequate if discounts or credits are allowed which exceed a reasonable reflection of expense savings and reasonable expected loss experience. Last, a rate is unfairly discriminatory if the application of premium discounts, credits, or surcharges among a group of risks does not bear a reasonable relationship to the expected loss and expense experience among the various risks.<sup>50</sup>

Finally, section nine provides the Department of Insurance with the investigative powers necessary to implement the new rate standards. The Department may require the insurer to provide, at the insurer's expense, all information necessary to evaluate the condition of the insurer and the reasonableness of the filing.<sup>51</sup> The Department may review an insurer's rates, records, and market conditions at any time and initiate proceedings to disapprove a rate that it preliminarily finds to be excessive, inadequate, or unfairly discriminatory. However, if the questioned rate has been in effect under departmental approval for one year or longer, the Department may disapprove it only if it finds that a material misrepresentation or material error was made by the insurer or was contained in the filing.<sup>52</sup> Section five provides the Department with some of the tools it will need to administer the increased regula-

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49. *Id.*, 1986 Fla. Laws at 704-05.

50. *Id.*, 1986 Fla. Laws at 706; *see also id.* § 10, 1986 Fla. Laws at 708 (describing risk management programs).

51. *Id.* § 9, 1986 Fla. Laws at 704 (amending FLA. STAT. § 627.062 (1985)).

52. *Id.*

tion.<sup>53</sup> The Department is authorized to employ actuaries to assist the Insurance Commissioner.<sup>54</sup> In order to attract qualified personnel, the Department is also empowered to set the salaries of these actuaries at levels commensurate with the salaries paid to actuaries in the insurance industry. Additionally, these actuaries are exempt from the Career Service System.<sup>55</sup> Rate regulation is further strengthened in section ten. This section requires reporting of calendar-year earned premiums, accident-year incurred losses and loss-adjustment expense, administrative and selling expenses attributable to Florida, policyholder dividends, and a schedule of Florida loss and loss-adjustment experience for each of the four most recent calendar years.<sup>56</sup> The four-year reporting requirement begins with accident year 1987, with the exception of medical malpractice insurance, for which the reporting requirement begins with accident year 1990. These reports form the basis for determining whether an insurer has realized excessive profits from commercial property or casualty insurance. Excessive profit has been realized if underwriting gain is greater than the anticipated underwriting profit plus four percent of earned premiums for the four most recent calendar years. Refunds of excess profits will first be available after 1990, except that they will first be available after 1993 for medical malpractice insurance.<sup>57</sup>

Section forty-two provides the Department with another enforcement tool.<sup>58</sup> It requires each liability insurer to maintain information relating to claims that resulted in final judgments, settlements, and final dispositions not resulting in payment on behalf of the insured. This section also requires insurers to maintain detailed information about the claim, including settlements, payments based on judgments, judgments appealed, loss-adjustment expense, and any "other information required by the [D]epartment to analyze and evaluate the nature, causes, location, cost, and damages involved in liability cases."<sup>59</sup>

Refunds under section ten encourage implementation of risk management programs, which can be expected to reduce losses

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53. *Id.* § 5, 1986 Fla. Laws 695, 702 (to be codified at FLA. STAT. § 624.307(6)).

54. *Id.*

55. *Id.* This section sets out salaries in accordance with FLA. STAT. § 216.251(2)(a)5 (1985).

56. *Id.* § 10, 1986 Fla. Laws at 708 (to be codified at FLA. STAT. § 627.0625).

57. *Id.*

58. *Id.* § 42, 1986 Fla. Laws at 734 (to be codified at FLA. STAT. § 627.9126).

59. *Id.*

paid by insurers.<sup>60</sup> Excess profits are to be placed in a fund, and the money in the fund, with interest, is to be distributed generally to policyholders that have implemented risk management programs proportionately on the basis of earned premium. In order to qualify, the risk management program must be based on guidelines developed and made available by the insurer, which must include safety measures, training in safety management techniques, and safety management counseling. Ultimately, section ten can be expected to reduce the pressure for increased rates by prohibiting excess or windfall profits and by encouraging policyholders to take actions to prevent or minimize losses.<sup>61</sup> Section seven restates existing law with respect to administrative proceedings in insurance rate cases.<sup>62</sup> A provision of the Administrative Procedure Act, section 120.57(1)(b)9, Florida Statutes, prohibits an agency from substituting its findings of fact for findings of a hearing officer which were supported by competent substantial evidence. Another provision prohibits a reviewing court from substituting its judgment for that of the agency as to the weight of evidence on a disputed finding of fact, unless the fact is not supported by competent substantial evidence.<sup>63</sup> This is consistent with case law holding that, as to weight or credibility of testimony, or when factual issues are otherwise susceptible to ordinary methods of proof, the hearing officer's findings must prevail if supported by competent substantial evidence.<sup>64</sup> Section seven provides that, in rate cases, the appellate court must set aside a final order of the Department of Insurance "if the department has violated section 120.57(1)(b)9, Florida Statutes, by substituting its findings of fact for findings of a hearing officer which were supported by competent substantial evidence."<sup>65</sup> This restatement of existing law was "comfort language" for an insurance industry concerned about potential abuses of the new powers granted to the Department under the Act. Section eleven conforms section 627.072, Florida Statutes,<sup>66</sup> to the changes made by section nine.<sup>67</sup> Under this prior law, the same rate factors applied

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60. *Id.* § 10, 1986 Fla. Laws at 708 (to be codified at FLA. STAT. § 627.0625).

61. *Id.*, 1986 Fla. Laws at 708-09 (to be codified at FLA. STAT. § 627.0625).

62. *Id.* § 7, 1986 Fla. Laws 695, 703 (to be codified at FLA. STAT. § 627.0612).

63. FLA. STAT. § 120.68(10) (1985).

64. *See, e.g., McDonald v. Department of Banking and Fin.*, 346 So. 2d 569 (Fla. 1st DCA 1977).

65. Ch. 86-160, § 7, 1986 Fla. Laws 695, 703 (to be codified at FLA. STAT. § 627.0612).

66. FLA. STAT. § 627.072(1) (1985).

67. *Compare* ch. 86-160, § 9, 1986 Fla. Laws 695, 704, *with id.* § 11, 1986 Fla. Laws at 711.

to all property and casualty insurance except motor vehicle insurance. Because section nine created new standards for most property and casualty insurance, the standards in section 627.072 were changed to apply only to workers' compensation and employers' liability insurance.<sup>68</sup>

Section twelve is also technical, conforming section 627.331(4), Florida Statutes,<sup>69</sup> to the changes made by section nine.<sup>70</sup> Certain reporting requirements that now appear in section nine are deleted from this provision.<sup>71</sup>

### C. Availability

Section three is an attempt to deal with the availability problem.<sup>72</sup> Under prior law, financial institutions were apparently prohibited from engaging in insurance agency activities, including participation in reinsurance or insurance exchanges.<sup>73</sup> Section three clarifies this law by allowing financial institutions to own or control an insurer that transacts only reinsurance in Florida and that actively engages in reinsuring risks located in Florida. Financial institutions are also authorized to participate in insurance exchanges that provide excess coverage for self-insurers.<sup>74</sup> This section should make it easier for insurers and self-insurers to cover Florida risks by making reinsurance and excess insurance more available, without putting financial institutions into direct competition with insurers.

Availability and cost problems could potentially be alleviated if group commercial property and casualty insurance coverage is offered. Prior law generally prohibited issuance of group commercial property or casualty insurance,<sup>75</sup> but section six authorizes the writing of this insurance on commercial risks under limited circumstances. The policy must require active participation in a risk management plan, pass the savings from reduced losses on to participants, and the rates must be actuarially sound in order to prevent unfair discrimination against nonmembers of the group.<sup>76</sup>

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68. *Id.* § 11, 1986 Fla. Laws at 711 (amending FLA. STAT. § 627.072(1)-.072(3) (1985)).

69. FLA. STAT. § 627.331(4) (1985).

70. Compare ch. 86-160, § 9, 1986 Fla. Laws 695, 704, with *id.* § 12, 1986 Fla. Laws at 712.

71. Ch. 86-160, § 12, 1986 Fla. Laws 695, 712 (amending FLA. STAT. § 627.331(4) (1985)).

72. *Id.* § 3, 1986 Fla. Laws at 699 (to be codified at FLA. STAT. § 624.45).

73. Final Staff Analysis, *supra* note 45, at 2.

74. Ch. 86-160, § 3, 1986 Fla. Laws 695, 699 (to be codified at FLA. STAT. § 624.45).

75. Final Staff Analysis, *supra* note 45, at 4.

76. Ch. 86-160, § 6, 1986 Fla. Laws 695, 702 (amending FLA. STAT. § 626.973 (1985)).

Section eight makes the process of reinsurance less cumbersome.<sup>77</sup> Under prior law, an insurer ceding direct insurance risks was required to file with the Department two copies of all documents relating to such cession, and the Department could retain an independent consultant to review the documents if it doubted the adequacy of the reinsurance.<sup>78</sup> Under the new law, the ceding insurer is required to submit a detailed summary of the reinsurance contract or treaty and such other documentation as the insurance commissioner requires. The new law also allows the commissioner to waive the requirements upon a showing of good cause.<sup>79</sup>

Section thirteen addresses the availability problem by authorizing the Department to create a risk apportionment plan for property and casualty insurance.<sup>80</sup> The Department may create a joint underwriting association with mandatory participation of insurers to provide insurance that is required by law and unavailable in the voluntary market. It also would provide insurance for commercial risks if the insurance is unavailable in the voluntary market, if failure to secure the insurance would substantially impair an entity's ability to conduct its business, and if the risk is determined not to be uninsurable. The definition of voluntary market under this section includes the market assistance program and the surplus lines market. Insurance under the plan would be equitably apportioned among the participating insurers and would be available at actuarially sound rates.<sup>81</sup>

Section fourteen takes another approach to the availability problem.<sup>82</sup> Under section 627.356, Florida Statutes, a group or association of attorneys may establish a self-insurance fund to insure against professional malpractice claims.<sup>83</sup> Section fourteen expands the authorization to certified public accountants, registered architects, professional engineers, veterinarians, land surveyors, and insurance agents.<sup>84</sup> Liability of members is individual, several, and proportionate, but not joint.<sup>85</sup> The section provides for assessments to cover deficiencies in such funds and requires the Department to disapprove rates charged to members of a fund unless expense fac-

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77. *Id.* § 8, 1986 Fla. Laws at 703 (amending FLA. STAT. § 624.610(9) (1985)).

78. FLA. STAT. § 624.610(9) (1985).

79. Ch. 86-160, § 8, 1986 Fla. Laws 695, 703 (amending FLA. STAT. § 624.610(9) (1985)).

80. *Id.* § 13, 1986 Fla. Laws at 713 (to be codified at FLA. STAT. § 627.351(5)).

81. *Id.*

82. *Id.* § 14, 1986 Fla. Laws at 716 (amending FLA. STAT. § 627.356 (1985)).

83. FLA. STAT. § 627.356(1) (1985).

84. Ch. 86-160, § 14, 1986 Fla. Laws 695, 716 (amending FLA. STAT. §§ 27.356 (1985)).

85. *Id.*

tors are justified and reasonable for the benefits and services provided.<sup>86</sup>

Section fifteen does for health care providers what section fourteen does for other professionals.<sup>87</sup> Eligibility to self-insure is expanded to include hospitals, physicians, osteopaths, podiatrists, chiropractors, psychologists, optometrists, dentists, pharmacists, nurses, health maintenance organizations, ambulatory surgical centers, and other medical facilities. As with the amendments to prior law contained in section fourteen, this section provides that liability is individual, several, and proportionate, but not joint. It also provides a mechanism for covering deficiencies and rate regulation.<sup>88</sup>

Sections nineteen through twenty-four also address the availability problem. Provisions relating to limited reciprocal insurers were originally adopted as part of the 1982 Sunset Act review of the Insurance Code.<sup>89</sup> In general, they allowed a group of 2 to 250 persons to pool and spread liabilities for any commercial property or casualty risk.<sup>90</sup> The Act expands availability of the limited commercial reciprocal option by removing the limitation on the number of members of the group, imposing a minimum surplus requirement of \$100,000 instead of the minimum net worth requirement of \$500,000, and by requiring maintenance of a sufficient reserve so as to be actuarially sound instead of limiting liability of the limited reciprocal to the combined net worth of the members.<sup>91</sup> The Act also expands eligibility of agents to sign policies issued by limited commercial reciprocals, prohibits limited commercial reciprocals from charging excessive rates, and provides for suspension of the certificate of authority of a limited commercial reciprocal if its financial condition endangers the interests of its subscribers.<sup>92</sup>

Sections twenty-five through forty help provide for increased availability by creating the Commercial Self-Insurance Fund Act.<sup>93</sup> Under this Act, a nonprofit trade association is authorized to create a self-insurance fund to provide property and casualty insur-

86. *Id.*

87. *Id.* § 15, 1986 Fla. Laws at 718 (amending FLA. STAT. § 627.357 (1985)).

88. *Id.*

89. Final Staff Analysis, *supra* note 45, at 15.

90. FLA. STAT. § 629.50 (1985).

91. Ch. 86-160, § 19, 1986 Fla. Laws 695, 722 (amending FLA. STAT. § 629.50 (1985)).

92. *Id.* §§ 21-23, 1986 Fla. Laws at 723-24 (amending FLA. STAT. §§ 629.511, .513, .517 (1985)).

93. *Id.* § 25, 1986 Fla. Laws at 724 (to be codified at FLA. STAT. § 624.460).

ance coverage to its members. The fund must maintain a certificate of authority issued by the Department and must maintain competent administrators, cash reserves, excess insurance, fidelity bonds, and an aggregate net worth of at least \$500,000.<sup>94</sup> Members' liability is individual, several, and proportionate, but not joint. If a fund cannot pay its obligation, policyholders will be assessed contributions on a pro rata earned premium basis. Dividends are prohibited unless they are approved by the Department. If a fund is financially impaired, the Department may order its board of trustees to make assessments to cover the deficiency, and any rehabilitation, liquidation, conservation, or dissolution of a fund must be conducted under the supervision of the Department.<sup>95</sup> However, rates charged by a fund may not be excessive, inadequate, or unfairly discriminatory. A rate is excessive if the associated expense factors are not justified or reasonable for the benefits and services provided. A rate is inadequate if, together with investment income, it is insufficient to sustain projected losses and expenses. Finally, a rate is considered to be unfairly discriminatory if discounts or credits exceed a reasonable reflection of expense savings and reasonably expected loss experience. Commercial self-insurance funds are subject to examination by the Department. Provisions of the Insurance Code relating to civil remedies, departmental rulemaking power, certificates of authority, investments, unfair and deceptive trade practices, filing fees, enforcement powers of the Department, rights of policyholders, contracts, and reporting apply to commercial self-insurance funds.<sup>96</sup> Section forty-one facilitates the use of the self-insurance option by exempting self-insurance agreements from securities registration requirements.<sup>97</sup>

Section forty-three adds four members to the board of governors of the property and casualty market assistance plan.<sup>98</sup> Three of these new members must represent insurance industry organizations, and the fourth must represent an unaffiliated insurer.<sup>99</sup>

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94. *Id.* §§ 26-29, 1986 Fla. Laws at 724-28 (to be codified at FLA. STAT. §§ 624.462, .464, .466, .468).

95. *Id.* §§ 31-34, 1986 Fla. Laws at 730-31 (to be codified at FLA. STAT. §§ 624.472, .473, .474, .476).

96. *Id.* §§ 37, 39-40, 1986 Fla. Laws at 733 (to be codified at FLA. STAT. §§ 624.482, .486, .488).

97. *Id.* § 41, 1986 Fla. Laws at 734 (amending FLA. STAT. § 517.051(10) (1985)).

98. *Id.* § 43, 1986 Fla. Laws at 735 (amending FLA. STAT. § 627.3515(2) (1985)).

99. *Id.*



Section forty-four amends the medical malpractice risk apportionment plan.<sup>100</sup> The section requires the plan to provide tail coverage to insureds whose claims-made coverage with another insurer has been or will be terminated. It also cures an apparent inconsistency between two prior years' laws. As described by the staff of the Senate Commerce Committee:

This section also cures a problem which arose from legislation which passed during the 1982 and 1983 sessions. Because of an inconsistent effective date, the 1983 legislation caused a seven-day gap during which . . . [Patient's Compensation Fund] . . . deficit assessment coverage was unavailable from the . . . [Florida Medical Malpractice Joint Underwriting Association] . . . . This section allows persons who applied for coverage during this limited period to obtain coverage.<sup>101</sup>

Section forty-five provides uniform rating classifications for medical malpractice policyholders, including those insured by the Florida Medical Malpractice Joint Underwriting Association.<sup>102</sup> For an individual physician or osteopath, the classification must be based on the number of surgical procedures performed annually. For an individual health care provider or health care facility, the classification must be based on the number and severity of indemnities resulting from claims of medical malpractice against the health care provider or facility.<sup>103</sup>

Section forty-six requires insurers issuing medical malpractice insurance to make available to physicians and osteopaths policies that provide coverage limits of \$100,000 per claim with a \$300,000 annual aggregate.<sup>104</sup> These policies meet financial responsibility requirements.

Sections forty-seven and forty-eight amend financial responsibility requirements for licensure as a physician or osteopath.<sup>105</sup> The sources of insurance coverage which comply with financial responsibility requirements are expanded to include surplus lines insurers. A licensee is allowed to use an irrevocable letter of credit as an

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100. *Id.* § 44, 1986 Fla. Laws at 736 (amending FLA. STAT. § 627.351(4)(d) (1985), to be codified at FLA. STAT. § 627.351(4)(j)).

101. Final Staff Analysis, *supra* note 45, at 19.

102. Ch. 86-160, § 45, 1986 Fla. Laws 695, 737 (to be codified at FLA. STAT. § 627.6055).

103. *Id.*

104. *Id.* § 46, 1986 Fla. Laws at 738 (amending FLA. STAT. § 627.6057 (1985)).

105. *Id.* §§ 47-48, 1986 Fla. Laws at 738-43 (amending FLA. STAT. §§ 458.320, 459.0085 (1985)).

alternative to maintenance of the required insurance coverage or escrow account.<sup>106</sup> The Act also expands exemptions from financial responsibility requirements. The most significant new exemptions apply to practitioners who have a positive claims history and whose practice is limited to fewer than 1,000 patient contact hours annually and to practitioners who agree to submit to disciplinary action if they fail to satisfy judgments against them. If a practitioner falls within these categories and avails himself of this statutory exemption, he must display a notice informing patients that he is not insured.<sup>107</sup>

#### *D. Consumer-Oriented Provisions*

Section four contains a series of amendments to section 626.9541(1), Florida Statutes, which defines unfair methods of competition and unfair or deceptive acts.<sup>108</sup> It clarifies a provision relating to illegal premiums by providing that the prohibition does not preclude collection of a premium for a universal life, variable, or indeterminate value insurance policy if the premium is in accordance with the contract. The prohibition on cancellation of a policy solely for the purpose of inducing the insured to pay a higher price for the same or similar coverage is expanded; under the Act, the prohibition also applies to the cancellation of a particular coverage even if the entire policy is not cancelled. This section also provides that it is illegal to fail to renew a policy or coverage solely because the insured was in an accident unless the insurer meets all applicable notice requirements. Notice requirements are also strengthened by the provision that the failure to comply with any cancellation or nonrenewal provision of the Insurance Code constitutes illegal dealing in premiums.<sup>109</sup> The applicability of section 626.9541(1)(o), Florida Statutes, is expanded to cover all life insurance and health insurance but, by its terms, very little of paragraph (o) is susceptible of application to life or health insurance.<sup>110</sup>

Section sixteen is a consumer-oriented provision that requires notice of cancellation, nonrenewal, or renewal premiums.<sup>111</sup> With respect to property, casualty, surety, or marine insurance, other than private passenger automobile insurance covered by section

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106. *Id.*

107. *Id.*

108. § 4, 1986 Fla. Laws at 700 (amending FLA. STAT. § 626.9541(1)(o) (1985)).

109. *Id.*

110. Final Staff Analysis, *supra* note 45, at 3.

111. Ch. 86-160, § 16, 1986 Fla. Laws 695, 721 (to be codified at FLA. STAT. § 627.4133).

627.728, Florida Statutes, an insurer must give the named insured forty-five days notice of nonrenewal or of the renewal premium, together with the reason for nonrenewal if the policy is not to be renewed. Such an insurer must also give forty-five days notice with reasons in cases of cancellation, except that: only ten days notice must be given in cases of nonpayment of premium; twenty days notice must be given during the first ninety days of the policy; and notice need not be given within the first ninety days of the policy if cancellation is based on material misstatement, misrepresentation, or failure to comply with underwriting requirements.<sup>112</sup> After any such policy has been in effect for ninety days, it may be cancelled only on the basis of a material misstatement, nonpayment of premium, failure to comply with underwriting requirements, a substantial change in the risk covered by the policy, or cancellation of an entire class of insureds. The section also provides for limited continuation of coverage upon failure of the insurer to comply with these notice requirements.<sup>113</sup>

Section seventeen requires the insurer to provide each named insured with a coverage identification number, which will be construed for regulatory purposes as a policy number.<sup>114</sup> Under prior law, a policy had to be delivered to the insured or another entitled person within a reasonable period of time after issuance.<sup>115</sup> Section eighteen imposes a sixty-day deadline on such delivery.<sup>116</sup>

### *E. Temporary Provisions*

Section sixty-three creates the Academic Task Force for Review of the Insurance and Tort Systems.<sup>117</sup> The Task Force, which will serve until the end of the 1988 Regular Session, is composed of the presidents of the University of Florida, Florida State University, and the University of Miami, and two additional members appointed by the three university presidents. In general, the Task Force is charged with studying insurance law, tort law, and the effects of the Act and with recommending further legislation.<sup>118</sup> Aside from its distinguished membership, the Task Force is unusual in that it has the power to subpoena, audit, and investigate;

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112. *Id.*

113. *Id.*

114. *Id.* § 17, 1986 Fla. Laws at 722 (to be codified at FLA. STAT. § 627.4205).

115. FLA. STAT. § 627.421 (1985).

116. Ch. 86-160, § 18, 1986 Fla. Laws 695, 722 (amending FLA. STAT. § 627.421(1) (1985)).

117. *Id.* § 63, 1986 Fla. Laws at 756.

118. *Id.*

it is exempt from the Administrative Procedure Act and from discovery in civil actions; it may procure information and assistance from any state officer or agency; and its personnel may include active faculty members of state universities that have law schools.<sup>119</sup>

Section sixty-four imposes one-time reporting requirements on liability insurers.<sup>120</sup> Each liability insurer is required to provide the Department, for the years 1981 through 1985, with the same information as the insurer is required prospectively to maintain by section forty-two.<sup>121</sup> This information will apparently be used by the Department in implementing the Act and by the Task Force in studying the insurance system.

Section sixty-six contains a series of transitional provisions.<sup>122</sup> The first provision requires commercial liability insurers to implement a special credit that, for a three-month period beginning on October 1, 1986, has the effect of reducing premiums to a rate forty percent below the rate in effect on May 1, 1986.<sup>123</sup> An insurer may avoid implementation of its special credit in one of two ways: if the Department finds the implementation would endanger the sol-

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119. *Id.* The legislature appropriated \$875,000 for creation of a tort reform study commission. Ch. 86-167, § 1, 1986 Fla. Laws 828 (line item 680A).

120. *Id.* § 64, 1986 Fla. Laws at 759. On July 15, 1986, the Second Judicial Circuit temporarily enjoined the Department of Insurance from enforcing the one-time reporting requirement of § 64 for a period of 90 days from the date of that order. *American Ins. Ass'n v. State*, No. 86-2262 (Fla. 2d Cir. Ct. July 15, 1986) (order granting temporary injunction), *appeal filed sub nom.* *Insurance Co. of N. Am. v. State*, No. BQ-90 (Fla. 1st DCA Oct. 27, 1986), *appeal docketed sub nom.* *Smith v. State*, No. 69,551 (Fla. Oct. 30, 1986). On September 4, 1986, the plaintiff insurers dismissed their attack on § 64.

121. Ch. 86-160, § 64, 1986 Fla. Laws 695, 759. *See supra* notes 58-59 and accompanying text.

122. Ch. 86-160, § 66, 1986 Fla. Laws 695, 761. On July 15, 1986, the Second Circuit temporarily enjoined the Department of Insurance from enforcing § 66(1)-(4), conditioned upon the payment by each insurer on October 1, 1986, of the gross amount estimated in good faith to be due under the credit and refund provision of the statute into an interest bearing trust account. *American Ins. Ass'n v. State*, No. 86-2262 (Fla. 2d Cir. Ct. July 15, 1986), *appeal filed sub nom.* *Insurance Co. of N. Am. v. State*, No. BQ-90 (Fla. 1st DCA Oct. 27, 1986), *appeal docketed sub nom.* *Smith v. State*, No. 69,551 (Fla. Oct. 30, 1986). On September 8, 1986, the court extended the date on which plaintiff insurers are required to place this money in an interest bearing account to October 15, 1986. *Id.* (Sept. 8 order on motion for additional temporary injunctive relief). The court also extended the injunctive period on § 66(4) by 15 days to October 28, 1986. *Id.* While the court had previously denied injunctive relief with regard to § 66(5)-(6) because it intended to resolve the case at the trial level prior to the time the law would affect the insurers, on September 8, 1986 it enjoined the Department of Insurance from enforcing the provisions of § 66(5)-(6) until October 15, 1986. *Id.* On November 4, 1986, the Florida Supreme Court, pending review, extended injunctive relief to December 1, 1986. *Smith v. State*, No. 69,551 (Fla. Nov. 4, 1986) (order extending injunction). *See infra* note 142.

123. Ch. 86-160, § 66, 1986 Fla. Laws 695, 761.

vency of the insurer, it may waive the requirement, and the insurer may delay implementation of the credit pending review by the Department to determine whether the credit will result in an inadequate rate. The section also fixes January 1, 1984, as a benchmark date for rate determinations. This provision has been inaccurately referred to as a rollback. The provision merely requires insurers' rate filings to justify all deviations from the rates in effect on January 1, 1984. Presumably, if an insurer's current rates are justifiable on the basis of the guidelines in the Act, the Department may not disapprove the rates.<sup>124</sup> The section also prohibits commercial property and liability insurers from using rates between July 1, 1986, and January 1, 1987, that exceed the rates in effect on May 1, 1986.<sup>125</sup> The section also prohibits cancellation or nonrenewal of any commercial property or liability insurance policy that was in effect on June 26, 1986, if the cancellation or nonrenewal was for the purpose of avoiding the special credit or the rate freeze imposed by the section.<sup>126</sup>

Versions of these transitional provisions appeared in the Senate committee substitute,<sup>127</sup> the Senate's second committee substitute,<sup>128</sup> the bill passed by the full Senate,<sup>129</sup> the House committee substitute,<sup>130</sup> and the bill passed by the full House.<sup>131</sup> There was some controversy, however, concerning whether the transitional rate provisions were financially dependent on, or independent of, the civil litigation reforms. There is strong evidence that this controversy was resolved in favor of the view that the two matters were independent. Although the statement of an individual legislator cannot be assumed to represent the consensus of 160 legislators, discussion by the conference committee that drafted the final version of the Act is instructive.

At the conference meeting of June 4, 1986, one of the issues discussed was whether the Act should be severable or nonseverable. The House position favored severability while the Senate took the opposite view. Discussion focused on whether the transitional provisions depended on tort reforms, with Representative Tom Gus-

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124. *Id.*

125. *Id.*

126. *Id.*

127. Fla. CS for SB 465 (1986).

128. Fla. CS for CS for SB 465 (1986).

129. Fla. CS for CS for SB 465 (1986) (First Engrossed).

130. Fla. CS for HB 1344 (1986).

131. Fla. CS for HB 1344 (1986) (First Engrossed).

tafson,<sup>132</sup> chairman of the House conferees, stating, "Rollback is an independent issue."<sup>133</sup> Senators Richard Langley<sup>134</sup> and Mattox Hair,<sup>135</sup> both of whom supported nonseverability, indicated that rate rollbacks were economically impossible without tort reform.<sup>136</sup> In response, arguing that interim measures were necessary and justified even before civil litigation reforms would take effect, Representative Gustafson stated:

[T]he facts also indicate that there have been extraordinary premium increases, unconnected with and substantially in excess of, any claim experience, and that has happened suddenly in the 1985 year, indicating that the increases have no justification on the basis of increased claims, but are because of business failures and misjudgments within the insurance industry itself. The extraordinary swings seem to have been done as a result of the insurance industry first low-balling their numbers and then getting in trouble and having to come up rapidly, and because of the failures in the reinsurance market, and because of the worldwide financial situation.<sup>137</sup>

That statement represents only the views of one member of the conference committee, but the fact that it was the House which ultimately prevailed on the severability issue gives the House conferee's remarks some weight. Stronger evidence that Representative Gustafson's view represented the legislative consensus comes from the Act itself; one of the clauses in the preamble states that "it is necessary . . . to protect the people's rights to affordable insurance coverage in the interim before comprehensive reform measures are fully effective."<sup>138</sup> This language, approved by overwhelming majorities of both houses, establishes that the rollbacks were based on the insurance industry's conduct rather than anticipated savings from civil reforms.

Section sixty-seven delays the Sunset Act review of the provisions on financial responsibility for physicians and osteopaths.

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132. Dem., Ft. Lauderdale.

133. Fla. Legis., Conference Comm. on CS for CS for SB 465, tape recording of proceedings (June 4, 1986) (on file with Secretary of Senate).

134. Repub., Clermont.

135. Dem., Jacksonville.

136. Conference Committee Tape, *supra* note 133.

137. *Id.*

138. Ch. 86-160, 1986 Fla. Laws 695.

Originally scheduled for review prior to January 1, 1989, these provisions will now be reviewed prior to October 1, 1996.<sup>139</sup>

Section sixty-nine provides that if any provision of the Act is invalid, the other provisions shall, nonetheless, be given their full effect.<sup>140</sup> Section seventy provides that the Act take effect on July 1, 1986, except as otherwise provided by the Act.<sup>141</sup>

### III. CONSTITUTIONAL ISSUES IN INSURANCE REGULATION

Any major regulatory reform can be expected to generate constitutional litigation. Chapter 86-160 is no exception; challenges to the Act are, as of October 1986, being litigated in Circuit Court.<sup>142</sup> This section is not intended as a commentary on the particular issues raised in that litigation, but instead addresses the major state constitutional issues raised by the insurance provisions of this Act.

#### A. *The One-Subject Rule*

The Florida Constitution requires that "Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title."<sup>143</sup> It has been suggested that insurance and tort reform are not one subject, and that the various aspects of insurance covered by the Act are not one subject.

The controlling case law on the issue suggests that the Act meets the constitutional requirement. The subject of an act may be as broad as the legislature chooses, as long as the matters included in the act have a natural or logical connection.<sup>144</sup> The purpose of the requirement is to prevent one act from becoming a cloak for dissimilar, disjointed legislation. The constitutional requirement is

139. *Id.* § 67, 1986 Fla. Laws at 763.

140. *Id.* § 69, 1986 Fla. Laws at 763.

141. *Id.* § 70, 1986 Fla. Laws at 763.

142. The Second Judicial Circuit held that ch. 86-160, 1986 Fla. Laws 695, did not violate the single subject provisions of art. III, § 6 of the Florida Constitution. *American Ins. Ass'n v. State*, No. 86-2262, slip op. at 43 (Fla. 2d Cir. Ct. Oct. 27, 1986), *appeal filed sub nom.* Insurance Co. of N. Am. v. State, No. BQ-90 (Fla. 1st DCA Oct. 27, 1986), *appeal docketed sub nom.* Smith v. State, No. 69,551 (Fla. Oct. 30, 1986). Further, the court ruled that §§ 9, 10, 13, 44, and 66 were constitutionally valid, except for the premium rebate provisions in § 66 insofar as they applied to contracts of insurance written and in force prior to July 1, 1986. In all other respects § 66 was held constitutionally valid. *Id.*

143. FLA. CONST. art. III, § 6.

144. *Board of Pub. Instruction v. Doran*, 224 So. 2d 693, 699 (Fla. 1969).

not designed to deter or impede legislation by requiring laws to be unnecessarily restrictive in their scope.<sup>145</sup>

In the preamble to the Act, the legislature found that torts and insurance are interdependent and interrelated.<sup>146</sup> Even without such a finding of fact, it is likely that the courts would find such a connection. In reviewing the 1976 law dealing with medical malpractice and insurance<sup>147</sup> and the 1977 law dealing with automobile insurance and torts,<sup>148</sup> the Florida Supreme Court held that the matters in the acts had a natural and logical connection, and that the acts, therefore, did not violate the prohibition against multiple subjects.<sup>149</sup>

Finally, in *United States Fidelity & Guaranty Co. v. Department of Insurance*,<sup>150</sup> a case involving several seemingly different aspects of insurance regulation, the Florida Supreme Court held that because each aspect of the challenged statute embraced the general subject of insurance, the statute did not violate the one-subject rule. In support of its rationale, the court further noted that "[a]s is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure."<sup>151</sup>

### B. Rate Regulation

In our heavily regulated society, it is easy to assume that almost any regulatory scheme will pass constitutional muster. However, this was not always the case.

In *Miami Laundry Co. v. Florida Dry Cleaning and Laundry Board*,<sup>152</sup> the seminal economic regulation case in Florida, the supreme court was faced with the issue of whether economic regulation is a lawful exercise of the state's police power. The primary bases for attacking the regulation were freedom of contract and the right to use one's property as one chooses. The supreme court

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145. *State v. Lee*, 356 So. 2d 276, 282 (Fla. 1978).

146. Ch. 86-160, 1986 Fla. Laws 695.

147. *Chenoweth v. Kemp*, 396 So. 2d 1122 (Fla. 1981).

148. *State v. Lee*, 356 So. 2d 276, 282 (Fla. 1978).

149. *Chenoweth v. Kemp*, 396 So. 2d 1122, 1124 (Fla. 1981) (citing *Board of Pub. Instruction v. Doran*, 224 So. 2d 693, 699 (Fla. 1969)); *State v. Lee*, 356 So. 2d 276, 282 (Fla. 1978).

150. 453 So. 2d 1355, 1362-63 (Fla. 1984).

151. *Id.* at 1360 (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22-23 (1976)). See *City of Tampa v. State ex rel. Evans*, 19 So. 2d 697 (Fla. 1944); *State ex rel. Adams v. Lee*, 166 So. 249 (Fla. 1935), *aff'd on reh'g*, 166 So. 262 (Fla. 1936).

152. 183 So. 759 (Fla. 1938).



found that an exercise of the police power must involve the public health, morals, and welfare of the state, or that the business regulated must be clothed with the public interest. But the court added: "[R]egardless of the basis on which [it is] done, if public necessity requires[,] it would be contrary to every concept of social justice to hold that the legislature could not grant relief."<sup>153</sup> The court went on to state that as soon as a person becomes part of an organized society, he surrenders some of his freedom, and the more complex society becomes, the more freedom a participant in society must yield.<sup>154</sup>

The court thus established the background for its holding. In rejecting the facial challenges to rate regulation, the court found:

Any business is affected by a public interest when it reaches such proportions that the interest of the public demands that it be reasonably regulated to conserve the rights of the public and when this point is reached, the liberty of contract must necessarily be restricted. If the regulation involves the question of price limitation, it will be upheld unless clearly shown to be arbitrary, discriminating, or beyond the power of the legislature to enforce.<sup>155</sup>

Simply stated, the court refused to sit as a super-legislature, finding instead that "[t]he legislature is accordingly the judge of when the facts are such that a given business should be regulated under the police power or when it is affected with a public interest to such an extent as to require regulation."<sup>156</sup> Consequently, if the regulation is not arbitrary or discriminatory and it bears a reasonable relation to the legislative purpose intended, the requirements of due process are satisfied.<sup>157</sup> While this view is unexceptionable today, fifty years ago it was a matter of controversy. Justice Brown filed a dissent in the *Miami Laundry* case that took up twelve pages of the *Southern Reporter*, vigorously arguing that the court had turned constitutional guarantees into "mere scraps of paper."<sup>158</sup>

Applying the supreme court's rationale in *Miami Laundry* to the Act, it is easy to conclude that the insurance industry is clothed

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153. *Id.* at 763.

154. *Id.*

155. *Id.*

156. *Id.* at 764.

157. *Id.*

158. *Id.* at 765 (Brown, J., dissenting).

with the public interest;<sup>159</sup> that rate regulation under the Act is not arbitrary or discriminatory because it applies throughout the field of commercial liability insurance and contains extensive guidelines for the implementing agency;<sup>160</sup> that the legislature has determined the public policy of the state;<sup>161</sup> and that such regulation is reasonably related to the purposes of the Act.<sup>162</sup>

A subsidiary issue was raised in another dry cleaning case.<sup>163</sup> It was argued that the legislature had selected an unnecessarily intrusive regulatory scheme. The Florida Supreme Court responded to that argument by holding: "[I]f guided by the rule of reason, the regulation will be upheld by the Courts. The fact that it has not been done before or was accomplished in some other manner is not material."<sup>164</sup> Thus it is irrelevant that the crisis in availability and affordability of insurance might have been solved in another way.

### C. *Excess Profits*

At first blush, it might appear that a law requiring a business to return "excess profits" is, if not unconstitutional, at least anti-capitalist and un-American. A recent decision of the Florida Supreme Court<sup>165</sup> upholds the power of the legislature to enact such a law, however.

In determining that the automobile insurance excess profits law<sup>166</sup> was constitutional, the court adopted the analysis used by the United States Supreme Court in upholding the state excess profits limits on the price of natural gas.<sup>167</sup> Essentially, this approach requires a balancing of a person's interests not to have his contracts impaired against the state's interest in exercising its legitimate police power.<sup>168</sup> The issue, then, is whether the law operates as substantial impairment.<sup>169</sup> Regulation that restricts a party to gains it reasonably expects from a contract does not necessarily

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159. See ch. 86-160, 1986 Fla. Laws 695.

160. *Id.* § 9, 1986 Fla. Laws at 704 (amending FLA. STAT. § 627.062 (1985)).

161. *Id.* § 2, 1986 Fla. Laws at 699.

162. *Id.*

163. *Florida Dry Cleaning and Laundry Bd. v. Everglades Laundry*, 194 So. 269 (Fla. 1939).

164. *Id.* at 383.

165. *United States Fidelity and Guar. Co. v. Department of Ins.*, 453 So. 2d 1355 (Fla. 1984).

166. FLA. STAT. § 627.066(13) (1985).

167. *Energy Reserves Group, Inc. v. Kansas Power & Light*, 459 U.S. 400 (1983).

168. *United States Fidelity and Guar. Co. v. Department of Ins.*, 453 So. 2d at 1360.

169. *Id.* (citing *Energy Reserves*, 459 U.S. at 411).

constitute a substantial impairment.<sup>170</sup> If the regulation does constitute a substantial impairment, it can still be valid if the state has a legitimate and significant public purpose behind the regulation, "such as the remedying of a broad and general social or economic problem" or the "elimination of unforeseen windfall profits."<sup>171</sup> The final question is whether the adjustment of contractual rights is appropriate to the public purpose. Courts properly defer to legislative judgment as to the necessity and reasonableness of such a measure.<sup>172</sup>

The Florida Supreme Court applied this approach to the automobile insurance excess profits law and found it valid:

Since section 627.066(13) allows insurers to keep their anticipated profits plus five percent, and since the insurers knew when they entered into these contracts that excess profits might have to be refunded, the statute does not operate as a substantial impairment of a contractual relationship. Furthermore, what minimal impairment does exist is outweighed by the state's interest in eliminating unforeseen windfall profits. . . . We do not find this method of protecting policyholders from paying exorbitantly high premiums to be unreasonable.<sup>173</sup>

In all but a few details, the excess profits provision of the Act is similar to the law upheld by the court in *United States Fidelity & Guaranty*. It provides for return of windfall profits to policyholders and prevents policyholders from being subjected to exorbitantly high premiums. The commercial liability excess profits law serves an additional public interest: it creates incentives for loss prevention, which are in the interest of both the public and the insurance industry.

#### IV. CONCLUSION

During the 1986 Regular Session, the Florida Legislature faced a rapidly developing and widely acknowledged crisis in availability and affordability of commercial liability insurance. It attempted to resolve that crisis with a comprehensive and constitutional act. Whether the attempt succeeds or whether commercial liability insurance becomes another crisis requiring the action of successive

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170. *Id.*

171. *Id.* (quoting *Energy Reserves*, 459 U.S. at 412).

172. *Id.* at 1361 (citing *Energy Reserves*, 459 U.S. at 413).

173. *Id.*

legislatures will be determined by the courts, the Florida Department of Insurance, and the Florida insurance industry.

